

REMARKS

Upon entry of this Response into the record, claims 1-20 will remain pending. Of those, claims 1-2, 8-9 and 14-15 are independent.

Allowable Subject Matter

Applicants acknowledge with appreciation the continued indication that claims 2-3, 9 and 15-16 define allowable subject matter but for their respective dependency on rejected base claims.

By this reply, formerly dependent claims 2, 9 and 15 have been rewritten into independent format in view their indication as containing allowable subject matter.

It is submitted that the amendments to claims 2, 9 and 15 do not represent grounds for refusing to enter the present amendments into the record.

§102 Rejection

The Examiner has maintained the rejection of claims 1, 4-8, 10-14 and 17-20 under 35 U.S.C. §102(e) as being anticipated by U.S. Patent 4,763,457 to Aguilar et al. (the '457 patent). The formal statement of that rejection begins on page 2 of the Final Office Action. Beginning on page 4 of the Office Action, the Examiner has presented rebuttal arguments vis-a-vis Applicants' Response filed May 6, 2005.¹

¹ Among the rebuttal arguments, on page 5 the Examiner asserts the following: "All rejections of claim limitations as filed prior to Amendment dated 05/06/2005 not argued in their entirety or substantively in the response to the prior Office Action have been conceded by Applicant and the rejections are maintained from henceforth." Applicants traverse: no such concessions have been made. Rather, Applicants have traversed with particularity a sufficient portion of the rejections to render the rejections improper as a whole, respectively. As such, it is unnecessary for Applicants to have traversed with particularity the rejection of each claim limitation. Beyond being unnecessary, requiring Applicants to do so would unfairly force Applicants to introduce gratuitous Prosecution History Estoppel.

On page 5 of the Final Office Action, the Examiner initially dismisses Applicants' traversal of the '457 patent as being based upon subject matter that is not claimed. Regardless, the Examiner goes on to assert that the '457 patent discloses the argued distinction. Again, Applicants traverse.

As to the assertedly unclaimed subject matter, Applicants' statement in question² arises in the context of the argument that a boot parameter is different than a kernel parameter. Applicants continue to assert this point.

Mindful that an applicant can be his own lexicographer, Applicants refer the Examiner to the first sentence of Applicants' paragraph [0002], which states the following definition:

“Tunable parameters” (sometimes also referred to as “tunable variables” or simply “tunables”) are variables that affect the operation of an operating system kernel...

Claim 1 (for example) recites the phrase “tunable parameters.” It is incumbent upon the Examiner to apply Applicants' definition of this phrase when interpreting the claims. Hence, it would be improper for the Examiner to dismiss (as relating to unclaimed subject matter) arguments that draw upon Applicants' definition of the claimed term “tunable parameters.”

The logic of Applicants' definition of the phrase “tunable parameter” similarly can be applied to the phrase “boot parameter.” Doing so leads to a definition that a boot parameter is a variable that affects the operation of a boot, i.e., that affects the boot process. As such, a boot parameter does not affect the operation of an operating system kernel because it affects the boot process.

In his rebuttal comments, the Examiner asserted that the '457 patent discloses a parameter representing the path, and a parameter representing the file name, of the operating

system kernel that is to be loaded. Changing the parameter that represents the path to the operating system kernel that is to be loaded may or may not change the boot process, but it does not change the operation of the operating system kernel that ultimately is loaded. Hence, it is unreasonable to interpret the parameter representing the path as being a tunable parameter.

Similarly, changing the name of the kernel that is to be loaded either represents a renaming of a given kernel or the identification of a different kernel that is to be selected. In the renaming circumstance, the same kernel is loaded such that the renaming causes no change in the operation of the kernel. In the circumstance that the name change identifies a different kernel, then the different kernel ultimately is loaded. While such a different kernel might change the operation of a system of which the kernel is apart, selection of a different kernel does not change the operation of the different kernel itself that ultimately is selected. Hence, it is unreasonable to interpret the parameter representing the filename of the kernel as being a tunable parameter.

Applicants submit that a distinction of claim 1 over the '457 patent remains the recitation of a plurality of tunable parameters, which Applicants have defined as variables that affect the operation of an operating system kernel. While the '457 patent might disclose boot parameters, boot parameters do not affect the operation of an operating system kernel.

Claims 4-7 depend at least indirectly from claim 1 and distinguish over the '457 patent at least for the same reasoning as claim 1, respectively.

Independent claims 8 and 14 recite at least a feature similar to the above-noted distinction of claim 1 over the '457 patent, and thus similarly distinguish over the '457 patent, respectively. Claims 10-13 and 17-20 depend from claims 8 and 14, respectively, and

² “[A] kernel parameter, i.e., a parameter manipulated, used and/or past along by the kernel.” (see page 10 of Applicants’ Response filed May 6, 2005).

distinguish over the '457 patent at least for the same reasoning as claims 8 and 14, respectively.

In view of the foregoing discussion, the §102(e) rejection of claims 1, 4-8, 10-14 and 17-20 is improper and Applicants request that it be withdrawn.

CONCLUSION

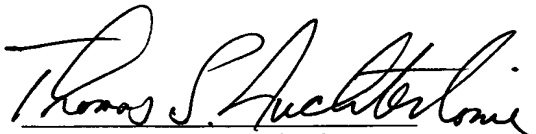
The issues raised in the Office Action are considered resolved. Accordingly, Applicants once again request a Notice of Allowability.

Person to Contact

In the event that any matters remain at issue in the application, the Examiners are invited to contact the undersigned for the purpose of a telephonic interview.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 08-2025 for any additional fees under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.

Respectfully submitted,
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